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**EX PARTE VIA ELECTRONIC COMMENT
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Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, D.C. 20554

Re:

WC Docket No. 04-313; CC Docket No. 01-338

Dear Ms. Dortch:

On behalf of Lightship Telecom, LLC ("Lightship"), this letter provides to the Commission our position on a key matter related to the above referenced dockets. Based on a thorough review of many of the other documents filed in these proceedings, we believe that UNE-P in small wire centers must be preserved in order to uphold established and legally sound principles and preserve a competitive market place.

I. The Impairment Test is Legally Sound and Should Be Maintained in Small Wire Centers

The Telecommunications Act of 1996¹ ("96 Act") and Triennial Review Order² ("TRO") focused on fostering, enhancing and sustaining competition in the local exchange market. Under the directives of the '96 Act, the FCC was tasked with executing this focus. In implementing the '96 Act, the FCC created unbundled network elements ("UNEs") that incumbent local exchange

¹ The Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq. ("96 Act")

² *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 16984 (2003) ("TRO"), *vacated in part*, *United States Telecom Assn v FCC*, 359 F3d 554 (DC Cir. 2004) ("USTA II").

carriers (“ILECs”) needed to make available at total-element long-run incremental costs (“TELRIC”) when impairment to competitor access was found.³ It appears, however, that the Commission is now considering a radical change to its current policy of UNE-P availability to enable competition.

Lightship strongly believes that the regulatory and legal premises for the ’96 Act and the resulting impairment tests are still valid. In the TRO, the Commission held that “*a requesting carrier is impaired without access to a network element if lack of access “poses an entry barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic.”*”⁴ This test has withstood significant court challenges and should still be enforced. It would be violated if unbundled local switching in small wire centers is eliminated. We are unaware of plans to change the standard and see no reason for the Commission to revisit this issue and eliminate or water it down now. Doing so would “send a dangerous signal to Verizon and others that they can ‘move the goalposts’ by making repeated demands for relief that the Commission has already considered and rejected.”⁵ The Commission should therefore continue to uphold the impairment test for unbundled local switching in smaller wire centers.

Note that Lightship holds this view even though we are a facilities-based CLECs.⁶ Facilities-based CLECs see two customer segments at issue: First, there is the small enterprise customer in small wire centers; Second, there are multi-location customers that have locations both on-net and also in many small wire centers. Multiple location customers are particularly critical to Lightship because they make up 40% of our customer base. These customers represent 50% of our revenue. Furthermore, approximately 17% of the locations for Lightship’s multi-location customers are small locations that do not qualify for Lightship’s on-net product, necessitating our need for UNE-P.⁷ Without an off-net product to serve the multi-location customers, Lightship would not find it profitable to build as many collocations as we have built thus far because an entire market segment (the multi-location customers) would be off limits to us.

³ Remarks by Michael K. Powell, Chairman, Federal Communications Commission, to the Association for Local Telecommunications Services, Crystal City, Virginia, November 30, 2001 (available at: <http://www.fcc.gov/Speeches/Powell/2001/spmcp111.html>).

⁴ USTA II (emphasis added).

⁵ Filing of multiple private equity firms in WC Docket 04-313 and CC Docket No. 01-338, November 19, 2004 (“VC”).

⁶ See, also, Filing of Eschelon Telecom, Inc. in WC Docket 04-313 and CC Docket No. 01-338, November 19, 2004.

⁷ See Declaration of Rainer Gawlick on Behalf of Lightship Telecom, submitted with ALTS Comments in WC Docket 04-313 and CC Docket No. 01-338, October 4, 2004 (“Gawlick Declaration”).

Without commenting on the merits of broad use of UNE-P, we assert that unbundled local switching of some flavor will be needed in small wire centers. By “small wire center,” we mean those with less than 7,000 business access lines. Without regulatory support for unbundled local switching in small wire centers, the competitive local telecommunications markets envisioned by the drafters of the '96 Act will not be possible since CLECs will encounter barriers to entry that make market entry uneconomic and, as a result, the impairment test will not be met.

II. ILECs Should Continue to Provide UNE-P Under the Existing Impairment Test For Smaller Wire Centers

ILECs argue that other solutions exist that might replace the current regulatory structure. We have found to the contrary with regards to unbundled local switching in smaller wire centers. While switching itself might no longer be impaired, the cost of collocation leads to impairment in all wire centers below a certain size.

Based on Lightship's experience, the up-front, non-recurring cost to collocate in a wire center is typically \$60,000 to \$70,000. With the return required by telecom investors, this represents a cost burden of \$1.50 per DS0. And the minimum monthly operating expense for collocation is \$2,000 or more (depending on multiple variables). This number is even higher without transport UNEs.⁸

With these inputs, Lightship has found that it needs at least 1,344 voice-grade equivalent lines (DS0s) in a wire center before it can collocate and transition to UNE-L with a cost structure similar to the ILECs' cost structure. For a 7,000-business line wire center, this means that a CLEC would need 20% market penetration, a very difficult hurdle to overcome. As the Association for Local Telecommunications Services (“ALTS”) stated in its October 4, 2004 filing in these dockets: “the evidence indicates that the revenue opportunities associated with the wire centers with relatively small concentration of business lines are too insignificant to overcome the relevant entry barriers, even when they are at their lowest.”⁹

Furthermore, there are no economical and technically feasible alternatives to collocation or UNE-P in a small wire center. EELs, for example, are not appropriate. As Eschelon reported to the Commission¹⁰, DS0 EELs are not a viable option. Because of gain problems, testing logistics and costs, and DLC configuration issues, DS0 EELs cannot replace UNE-P. And DS1 EELs are not warranted for smaller businesses or locations that cannot justify the cost of a DS1.

In the absence of other alternatives, the FCC must preserve the impairment test for unbundled local switching in small wire centers. Otherwise, competition will be devastated in

⁸ See Gawlick Declaration for a thorough discussion of these issues.

⁹ Filing by ALTS in WC Docket 04-313 and CC Docket No. 01-338, October 4, 2004.

¹⁰ Filing by Eschelon Communications, Broadview Networks, Inc, and Talk America, Inc. in CC Docket Numbers 01-338, 96-98, and 98-147, November 26, 2002.

small wire centers.¹¹ And without the CLECs, there would be no meaningful competition in the enterprise telecommunications market for small wire centers.¹² Small businesses resident in these small wire centers would face a monopoly situation – a clear contradiction to the express goals of the '96 Act.

III. Other Alternatives Do Not Provide Meaningful Competition in the Enterprise Market

The ILECs contradict the above arguments in multiple filings, suggesting that intermodal competitors such as cable and wireless providers provide sufficient competition in the marketplace, even without CLECs. However, accurate information filed by many other parties, such as economists and carriers like AT&T, reveals that cable-based and wireless-based service to enterprise customers is *de minimis*, especially in small wire centers. And within those filings in these dockets, they reference many other sources that support these findings.¹³

ILECs also argue that VoIP should be considered in the competitive mix. To this, we point out the fact that VoIP requires a broadband connection that, according to the UNE "Fact" Report, costs between \$72 and \$90 per month.¹⁴ VoIP service providers acknowledge that without CLECs to provide that connection, they would have a difficult time entering the market since the ILECs are not attractive partners..¹⁵ There are several reasons for this acknowledgement: (1) ILECs are the current bottleneck provider of DSL service; while they are not blocking out others such as the independent VoIP service providers from using their DSL service, they have the potential to do so in the future or, at least, to disadvantage other service providers (e.g., by not offering QOS guarantees needed for enterprise-grade VoIP); (2) ILECs also currently engage in the bundling of its voice and DSL services while only making naked DSL connections available to competitors; providing that those competitive products are not as attractive to end customers; and (3) ILECs face no pricing pressures in their DSL offerings today and, without effective competition from CLECs, they can price DSL at any level they desire,

¹¹ Filing by Consumer Federation of America in WC Docket 04-313 and CC Docket No. 01-338.

¹² Filing by Covad in WC Docket 04-313 and CC Docket No. 01-338, November 19, 2004.

¹³ Filing of AT&T in WC Docket 04-313 and CC Docket No. 01-338, November 30, 2004. *See, also*, Filing of Cbeyond Communications LLC in WC Docket 04-313 and CC Docket No. 01-338, November 19, 2004.

¹⁴ Filing of Fones4All Corporation in WC Docket 04-313 and CC Docket No. 01-338, November 30, 2004.

¹⁵ From statements made in ALTS Business and Policy Conference, Washington, D.C., December 1, 2004.

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making it difficult for any VoIP service provider to earn a positive return on investment. Consequently, if the regulatory policy were to change, eliminating unbundled local switching in small wire centers, ILECs would become a monopoly provider of Voice services. As a result, while ILECs might not have a true monopoly on all facilities, they would have a monopoly on small wire center access unless either unbundled local switching is preserved or another access technology such as a UNE-DSL was made available to CLECs and VoIP providers at TELRIC pricing.

IV. Conclusion

In light of the above issues and concerns, Lightship believes that the Commission must maintain the impairment test for unbundled local switching in small wire centers. The Commission cannot comply with its regulatory mandate to preserve a competitive market structure without this finding. In fact, by not maintaining the impairment test for unbundled local switching in small wire centers, it would be in violation of the '96 Act and, specifically, the impairment test.

We urge the Commission to uphold its '96 Act mandate, to foster, enhance and sustain competition in the local exchange market. In the alternative, or in addition to the first option, the Commission should develop a UNE-DSL offering for these small wire centers, improving the logistics of how CLECs order DSL capable loops and establishing parameters around the pricing structure. With these two possible solutions, the Commission can ensure that competition does not disappear into the thin air of monopolistic pricing pressures.

Respectfully submitted,

/s/ David Berndt

David Berndt
Director of Regulatory Affairs
Lightship Telecom LLC